MOTION FILED
FEB 13 1978

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-240

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ET AL.,
Petitioners,

vs.

DAVID M. BARRY, M.D., ET AL.,
Respondents.

MOTION OF LAKESIDE HOSPITAL, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF LAKESIDE HOSPITAL, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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DAVID M. BARRY, M.D., ET AL.,
Respondents.

MOTION OF LAKESIDE HOSPITAL, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Lakeside Hospital, Inc. respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae.*

Lakeside Hospital, Inc. has an interest in this case in that it has pending presently in the United States District Court for the Western District of Tennessee, Western Division, a case in which the question involved is, in part, the same as that presented for decision in the instant case, namely the scope of the coercion, boycott, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption.

Lakeside Hospital, Inc.'s cause of action in the United States District Court for the Western District of Tennessee, Western Division, is against the Memphis, Tennessee, area Blue Cross/Blue Shield Plan and the national Blue Cross and Blue Shield associations. Many of the lower court decisions involving application of the McCarran-Ferguson Act's business of insurance exemption, and the boycott exception thereto, involve Blue Cross and Blue Shield plans across the country. Blue Cross and Blue Shield

control approximately one-half of the medical and hospital reimbursement market in the United States. Because of the protection and shelter Blue Cross and Blue Shield have sought through coverage under the McCarran-Ferguson Act, this Court's decision in the case presently before it could have far-reaching consequences to Lakeside Hospital, Inc. and other providers of services to Blue Cross and Blue Shield policyholders throughout the nation.

In addition, while the brief of the original plaintiffs, and present respondents, in the United States Court of Appeals for the First Circuit argues in favor of an interpretation of the boycott, coercion, or intimidation exception similar to the interpretation advocated by Lakeside Hospital, Inc., the discussion therein is inadequate to the extent that it does not cover the cause of action of which this movant is a party in the United States District Court for the Western District of Tennessee, Western Division, and the rulings thus far in that action. Lakeside Hospital, Inc. has no reason to believe that discussion of this particular cause of action will be substantially expanded in this Court by the respondents. The respondents do not object to the filing of a brief by this applicant as *amicus curiae*.

WHEREFORE, Lakeside Hospital, Inc. respectfully requests this Court to permit it to file the brief *amicus curiae* which is submitted herewith.

Respectfully submitted,

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February 10, 1978.

BRIEF AMICUS CURIAE FOR LAKESIDE HOSPITAL, INC. IN SUPPORT OF RESPONDENTS

I

QUESTION PRESENTED

While the McCarran-Ferguson Act expressly exempts the business of insurance from the Sherman Act to the extent it is regulated by the states, the McCarran-Ferguson Act also contains an express exception to that exemption for acts of boycott, coercion or intimidation.

In a 2 to 1 decision, the United States Court of Appeals for the First Circuit rejected the argument propounded by the original defendants and present petitioners that the boycott, coercion or intimidation exception should be applied only to blacklisting between or among insurance companies or their agents and held that the exception encompassed claims by policyholders based upon alleged conspiracies by insurance companies to limit available insurance coverage.

The Court is called upon to decide whether the boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption applies only to acts of blacklisting or to a broader range of activities.

II

ARGUMENT

1. The Decision Below Is Consistent With Decisions of Other Courts of Appeals As Well As With Various District Court Decisions.

Various United States circuit courts as well as district courts have addressed the scope of the boycott, coercion,

or intimidation exception to the McCarran-Ferguson exemption.

Of the United States Courts of Appeals that have addressed the scope of this exception, most have indicated that it should not be applied narrowly, but rather should be taken at face value and applied broadly, as held by the United States Court of Appeals for the First Circuit in the case presently before this Court. In *Monarch Life Insurance Co.* v. *Loyal Protective Life Insurance Co.*, 326 F.2d 841 (2d Cir. 1963), *cert. denied* 376 U.S. 952 (1964), although the actions alleged by the plaintiff involved, in effect, blacklisting, the Second Circuit did not limit application of the exception to such actions and emphasized the all-inclusive language of the boycott, coercion or intimidation exception. Noting that it is axiomatic to interpret statutes whenever possible to effectuate their underlying purpose and intention, the Court declared:

> When the language of Section 3(b) is examined in the light of our understanding of Congressional purpose, we do not find ourselves driven to adopt an interpretation which flies in the face of the meaning intended by Congress. The statutory wording of § 3(b) provides that "[n]othing contained in this Act shall render . . . the Sherman Act inapplicable to any agreement to boycott. . . ." Under our interpretation, *all* (emphasis added) boycotts or agreements to boycott condemned by the Sherman Act are rendered subject to federal law. . . . [326 F.2d at 845-6.]

In *Dexter* v. *Equitable Life Assurance Society*, 527 F.2d 233 (2d Cir. 1975), while the Court held that the actions in question constituted the business of insurance for purposes of the McCarran-Ferguson Act's exemption, it also noted that it was not addressing the applicability of the boycott, coercion, or intimidation exception because

the plaintiff had not argued that the defendant's conduct included such acts.

In *Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (3d Cir. 1973), *cert. denied* 414 U.S. 1093 (1973), the Third Circuit failed to find any boycott, coercion, or intimidation, but indicated that the exception covering these activities would have been applicable had any such activities been established by the plaintiff. As stated by the Court in *Travelers*:

> . . . Travelers asserts that Blue Cross used "coercion" to extract concessions from the hospitals. The district court held, and we agree with its conclusion, that the economic inducements which made the Blue Cross contract acceptable to hospitals did not amount to "coercion." [481 F.2d at 84.]

The clear implication from the court's statements is that if there had been boycott, coercion or intimidation, it would not have applied the McCarran-Ferguson exemption. More recently, in *Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 554 F.2d 1253 (3rd Cir., 1977), *cert. den.* No. 77-171 (U.S. October 3, 1977), in a *per curiam* decision, the Third Circuit indicated that the McCarran-Ferguson exemption for the business of insurance applied to Philadelphia Blue Cross *unless* the plaintiff was able to demonstrate the use of "boycott, coercion or intimidation" by Blue Cross.[1]

In *Ballard, et al.* v. *Blue Shield of Southern West Virginia, Inc., et al.*, 543 F.2d 1075 (4th Cir. 1976), *cert. de-*

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1. In its decision, the District Court noted that the exception should not be strictly limited to insurance company blacklisting but rather should be viewed as reaching other practices which have the same purpose and effect *or* which are equally pernicious in violating the concepts of competition and fair play. *See Frankford Hospital* v. *Blue Cross of Greater Philadelphia*, 417 F.Supp. 1104, 1110 (E.D. Pa. 1976).

nied 45 U.S.L.W. 3601 (March 8, 1977), the United States Court of Appeals for the Fourth Circuit also rejected the defendants' argument that the boycott, coercion, or intimidation exception should be applied narrowly. That case involved a lawsuit by West Virginia chiropractors against six corporations that sell Blue Cross/Blue Shield health insurance, the doctors who are the directors of the corporations, and the West Virginia Medical Association. The court held that the boycott, coercion, or intimidation exception to the McCarran-Ferguson exemption applied to such acts directed against the plaintiff chiropractors.

In *Battle* v. *Liberty National Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), the United States Court of Appeals for the Fifth Circuit held that the boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption would be applicable even though the alleged acts were not directed against another insurance company. The decision by the Fifth Circuit placed no implied limitations on the application of this exception. The court did not answer the question of whether the defendants had engaged in such acts, stating:

> The complaint specifically alleges that the defendants have engaged in such activities. . . . Liberty National, it is asserted in the Complaint, has threatened to cancel contracts of those who oppose its activities. . . . Without a hearing to establish the validity of such contentions, the District Court could not accurately determine the applicability of this limitation to this McCarran-Ferguson Act. [493 F.2d at 51.]

In addition to decisions by various United States Courts of Appeals, various United States District Courts have also indicated that the boycott, coercion or intimidation exception should apply to all such acts. *See Professional Adjusting Systems of America, Inc.* v. *General Adjustment Bureau, Inc.*, 64 F.R.D. 35 (S.D. N.Y. 1974); *Ackerman Shillingsworth* v. *Pacific Electric Contractors Ass'n*, 405 F.Supp. 99 (D. Hawaii 1976). As indicated by the Court in *United States* v. *Insurance Board of Cleveland*, 144 F.Supp. 684 (N.D. Ohio 1956), the boycott, coercion, or intimidation exception should not be interpreted narrowly. As stated by the court:

> By the terms of Section 1013(b), Congress made it clear that agreements to boycott, or acts of boycott affecting the insurance business remain at *all times* (emphasis added) within the effective ban of the Sherman Act. [144 F.Supp. at 690.]

Counsel for *amicus curiae* filed on behalf of Psychron, Inc., d/b/a Brunswick Hospital and Clinic, which is now Lakeside Hospital, Inc. and a subsidiary of Charter Medical Corporation, in the United States District Court for the Western District of Tennessee, Western Division, a complaint against Memphis Hospital Service and Surgical Association, Inc., d/b/a Blue Cross and Blue Shield Plan Insurance of Memphis, the Blue Cross Association, and the National Association of Blue Shield Plans, alleging violations of §§ 1 and 2 of the Sherman Act and seeking to recover threefold the damages suffered by Psychron, Inc. because of those violations by the defendants. *See Psychron, Inc.* v. *Memphis Hospital Service and Surgical Association, Inc., et al.*, No. C-75-52 (W.D. Tenn., filed February 4, 1975).

In its complaint, the plaintiff, Lakeside Hospital, Inc., claims that the defendant, Blue Cross and Blue Shield Plan Insurance of Memphis, is controlled by certain so-called non-profit hospitals (known as the Big Three) in the Memphis, Tennessee, area and that Blue Cross/Blue Shield has, through the actions of its Board of Directors, the members of which are all selected by the Big Three,

instituted and carried out a policy of reimbursement to hospitals which arbitrarily discriminates against for-profit hospitals,—such as that operated by Lakeside, Inc.—with the purpose and/or effect of injuring the restraining trade in the medical, clinical and hospital field.

The plaintiff in its complaint alleges that Blue Cross/Blue Shield has adopted a reimbursement policy which amounts to price fixing, under which the so-called non-profit hospitals are reimbursed their full billed charges for services rendered to Blue Cross/Blue Shield policyholders, while, at the same time, the charges of for-profit hospitals for services rendered to Blue Cross/Blue Shield policyholders are automatically and arbitrarily reduced before reimbursement is made. Blue Cross/Blue Shield controls thirty-five (35) to fifty (50) percent of the medical reimbursement market in the Memphis, Tennessee area.

The complaint alleges discrimination against for-profit hospitals in at least three ways. First, non-profit hospitals are paid their full charges, while for-profit hospitals are required to "negotiate" with Blue Cross/Blue Shield as to what the amount of reimbursement will be. Second, if the for-profit hospitals were perfect negotiators, the best they could get would be ninety (90) percent of their regular charges, but most such hospitals have been paid considerably less. Third, for-profit hospitals also must sign a "special contract" with many restrictive provisions (such as waiver of any right to collect any balance unpaid by Blue Cross/Blue Shield from the patient), while so-called non-profit hospitals signed no such contract and were paid in full their regular charges. (Both groups of hospitals do pay a three (3) percent administrative charge.)

In its complaint, the plaintiff also alleges that Blue Cross and Blue Shield Plan Insurance of Memphis have engaged in an unlawful combination and conspiracy with the so-called non-profit hospitals to restrain trade and to monopolize the market for medical, clinical, and hospital services and that activities pursuant thereto include acts of boycott, coercion, and intimidation against the plaintiff with the intent and purpose of destroying competition. Specifically, the plaintiff alleges that through the use of its dominance in the marketplace and its economic power, Blue Cross and Blue Shield Plan Insurance of Memphis attempted to coerce the plaintiff into accepting a permanent contract at discriminatory levels of reimbursement and that, because the plaintiff refused to submit to such coercion, said defendant actually cut off reimbursement to the plaintiff and refused to reimburse it for services provided to Blue Cross Plan members on any basis for a certain period of time. As another means of coercion and intimidation, the plaintiff alleges that Blue Cross and Blue Shield Plan Insurance of Memphis unjustifiably and wrongfully rejected certain claims and delayed an unreasonable length of time in paying certain other claims submitted to it by the plaintiff. In addition, the plaintiff alleges that it and certain other proprietary hospitals have been required to cost-justify charges and provide full medical records while the so-called non-profit hospitals have not been so required.

Also, affidavits have been filed with the Court indicating efforts by Blue Cross and Blue Shield Plan Insurance of Memphis to persuade Blue Cross policyholders to seek treatment and services in hospitals other than the plaintiff's hospital because said hospital "does not provide treatment and services covered by Blue Cross policies" or "is not an approved hospital." In effect, plaintiff has al-

leged that Blue Cross knowingly has attempted to persuade and divert patients from using the plaintiff's facilities by imposing an arbitrary and unfair burden on those who wish to use those facilities and by actively misleading potential patients as to the status of the hospital and the services rendered therein.

Soon after the complaint was filed, the Court issued a preliminary injunction (1) prohibiting the defendant from persuading or attempting to persuade or divert any group of individuals from using the plaintiff's hospital and (2) requiring the defendant to reimburse the plaintiff at a rate of at least ninety (90) percent of the average room rate of the so-called non-profit hospitals and at a rate equal to the highest rate charged by any of the non-profit hospitals for ancillary charges. The Court noted that the ninety (90) percent figure was of course temporary in nature and that final damages might very well include the difference between what the defendant is required to pay the plaintiff under the injunction and what the plaintiff should actually be paid under a policy of reimbursing all hospitals their full billed charges.

The defendant National Association of Blue Shield Plans filed a Motion for Summary Judgment on the basis that (1) the McCarran-Ferguson Act's business of insurance exemption was applicable and that (2) in the alternative, the boycott, coercion, or intimidation exception to that exemption was inapplicable. As is the case with the petitioners in the case presently before this Court, the National Association of Blue Shield Plans argued that the boycott, coercion, or intimidation exception applies only to actions of insurers and insurance agents against other insurers or insurance agents, in effect "blacklisting."

The United States District Court for the Western District of Tennessee, Western Division, refused to accept this limitation on the boycott, coercion, or intimidation exception advocated by the defendant National Association of Blue Shield Plans. In its Order of August 9, 1977, denying the defendant's Motion for Summary Judgment (App. A, infra, p. 22), the Court stated that a number of recent Court decisions reflect "the better rule and that the boycott, intimidation and coercion exception to the McCarran Act should not be limited to instances of blacklisting within the insurance industry." In particular, the Court cited the *Travelers*, *Ballard*, and *Battle* decisions, in addition to the decision presently under consideration by this Court, in support of a broad application of the boycott, coercion, or intimidation exception. The Court held that the plaintiff stated a colorable claim of boycott, coercion, or intimidation which it was entitled to develop at trial. Should this Court limit the application of the boycott exception to "blacklisting" between or among insurance companies or their agents, Lakeside Hospital, Inc. will not have the opportunity to prove acts of boycott, coercion, or intimidation at trial.[2]

In summary, Lakeside Hospital, Inc. submits that the clear trend of the law reflects that the boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's exemption for the business of insurance should not be applied narrowly as advocated by the petitioners, but rather should be taken at face value and applied to *all* acts of boycott, coercion, or intimidation.

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2. In its action against Blue Cross/Blue Shield, Lakeside Hospital, Inc. contends also that the McCarran-Ferguson Act's business of insurance exemption is not even applicable to the activities of the defendants in question. The District Court has held that said exemption is applicable (App. A, infra, p. 19). However, the scope of the exemption itself is not the question presently before this Court.

2. The Decision Below Is Consistent With the Long-Standing Policy of Applying the Antitrust Laws Broadly and Exemptions to Them Narrowly.

In its denial of the defendant National Association of Blue Shield Plans' Motion for Summary Judgment, the District Court in *Psychron* also referred to the policy considerations involved in deciding the applicability of the boycott, coercion, or intimidation exception (App. A, infra, p. 22).

The United States Supreme Court's decision in *S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453 (1969), is indicative of a long-standing general rule that exemptions to the antitrust laws should be interpreted narrowly and application of the antitrust laws should be interpreted broadly due to the remedial nature of those laws. As stated by the United States Supreme Court in *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968), it is a basic "canon of construction that remedial statutes should be liberally construed." This Court recently re-emphasized this general rule in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), stating:

> Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.
>
> The language of § 1 of the Sherman Act, of course, contains no exception. 'Language more comprehensive is difficult to conceive.' *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 553 (1944). [421 U.S. at 789.]

In *Federal Maritime Commission* v. *Seatrain, Inc.*, 411 U.S. 726 (1973), the United States Supreme Court placed narrow limits on an exemption to the antitrust laws set forth in § 15 of the Shipping Act. In so holding, the Court

stated, "(A) broad reading . . . would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed."

The United States Supreme Court took this approach in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), as well, stating:

> When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws. [410 U.S. at 374.]

The broad application of the antitrust laws and narrow application of exemptions are also reflected in the leading United States Supreme Court case of *Allen Bradley Co.* v. *Local 3*, 325 U.S. 797 (1944). This landmark decision dealt with the exemption accorded labor unions from the antitrust laws, and the Court held that, while certain union activities are exempt from those laws, certain other union activities are not exempt, namely those which are not regarded as normal and usual activities. In that particular case, the Court held that union agreements with contractors and manufacturers that require contractors to deal only with those manufacturers who have closed shop agreements, and that bring about price and market control, are not exempt from the antitrust laws. As stated by the Court:

> There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union

participates, and such participation is a violation of the Act. [325 U.S. at 811.]

Consistent with this overall, long-standing policy, implied limitations should not be placed on application of the boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption. It is well-established that limitations on the applicability of the antitrust laws should not be implied. *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 351 (1962). The reasonable interpretation and application of the boycott, coercion, or intimidation exception, as set forth by the First Circuit in its decision and by other United States circuit and district courts, as previously cited, is in keeeping with this need to apply the antitrust laws broadly, to interpret limitations on their application narrowly, and to avoid implied limitations on their applicability.

III

CONCLUSION

The First Circuit's decision is in keeping with recent decisions in a number of other circuits and district courts and, more importantly, reflects the long-standing policy of applying the antitrust laws broadly and avoiding implied limitations on those laws. The boycott, coercion, or intimidation exception to the McCarran-Ferguson Act's business of insurance exemption should be taken at face value and be deemed applicable to all such acts.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

C-75-52

PSYCHRON, INC., d/b/a BRUNSWICH HOSPITAL AND CLINIC,
Plaintiff,

vs.

MEMPHIS HOSPITAL SERVICE AND SURGICAL ASSOCIATION, INC., d/b/a BLUE CROSS AND BLUE SHIELD PLAN OF MEMPHIS, THE BLUE CROSS ASSOCIATION OF BLUE SHIELD PLANS,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed August 9, 1977)

The defendants in this action have moved the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant National Association of Blue Shield Plans (NABSP) moves for summary judgment on the grounds that it lacks any involvement in the hospital reimbursement policies of Memphis Blue Cross, which, it asserts, is the only issue in this lawsuit. The defendant NABSP, joined by the defendant Memphis Blue Cross, moves for summary judgment alternatively on the grounds that the McCarran-Ferguson Act, 15 USC

§1011 et seq., which exempts state-regulated insurance businesses from the application of the antitrust laws, deprives this Court of jurisdiction over this cause.

As to both issues, it is asserted that there are no genuine issues as to any material fact and that the defendants are entitled to judgment as a matter of law. Upon consideration of defendants' Motion, the responses thereto and the applicable law, the Court is of the opinion that summary judgment cannot be granted upon any issue. The Motion is therefore denied.

I. LACK OF INVOLVEMENT FOR HOSPITAL REIMBURSEMENT

The first basis for the Motion of NABSP asserts that this action involves only the issue of the legality of the hospital reimbursement policy of defendant Memphis Blue Cross and that the defendant NABSP has no involvement in hospital reimbursement. NABSP asserts that this case necessarily involves a dispute only about hospital reimbursement and not physicians' reimbursement because under Tennessee law it is unlawful for a hospital to collect fees for physicians' services from a hospital and medical service corporation. TCA §56-3101. It is defendant's position, therefore, that plaintiff could not possibly have been injured by the Memphis Plan's physician reimbursement policy regardless of whether it is discriminatory. A well established principle of the antitrust laws holds that a plaintiff must plead and prove that the antitrust violations complained of proximately caused his injury. *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. den.*, 372 U.S. 907 (1963). Therefore, defendant asserts, plaintiff cannot base its antitrust claims on this ground.

With respect to plaintiff's allegation concerning hospital reimbursement, defendant asserts that the pleadings, discovery and affidavits filed in this cause conclusively show that NABSP is in no way involved in the hospital reimbursement policies of the defendant Memphis Blue Cross. The primary purpose of NABSP as an organization, defendant points out, is to promote the establishment and operation of plans of physician reimbursement. The affidavit of the president of NABSP has been submitted. It states that NABSP has no contact with local Plans, including the Memphis Blue Cross Plan, with respect to any aspect of hospital reimbursement and that NABSP does not prescribe, suggest, recommend, influence or discuss the amounts, terms, or methods of reimbursement for such services. An affidavit to the same effect has been filed by the president of Memphis Blue Cross. Furthermore, NABSP asserts, the allegations of plaintiff's Complaint and plaintiff's answers to defendant's interrogatories attack only the hospital reimbursement policies of Memphis Blue Cross, not its physician reimbursement policy. Finally, defendant notes, plaintiff's interrogatories and depositions of defendants' officials have failed to disclose any relationship between NABSP and the Memphis Plan with respect to hospital reimbursement.

NABSP's Motion for Summary Judgment cannot be granted because plaintiff in its Complaint also alleges discrimination with respect to physician reimbursement. Part XV of the original Complaint states:

> Further, Defendant Blue Cross now refuses on any basis to reimburse the Plaintiff's medical staff and doctors for the same or substantially similar services rendered to patients of the Plaintiff, although Blue Cross reimburses the medical staffs and doctors performing services of the Big Three. This conduct has

> created the imminent likelihood that Plaintiff will be immediately forced out of business because its medical staff will cease to function.

Therefore, plaintiff has alleged discrimination by the defendants in the reimbursement of physicians on plaintiff's staff. NABSP is much involved in the direction and control of physician reimbursement policy. Since physician reimbursement is an issue in this lawsuit at this time, defendant cannot be granted summary judgment on the basis of its lack of involvement in hospital reimbursement. The fact that Tennessee law precludes hospitals from collecting for physicians' services does not mean that plaintiff cannot be injured by defendant's physician reimbursement policies. A hospital is injured indirectly or secondarily if the members of its medical staff are discriminated against in reimbursements because they are members of the hospital staff. The injury becomes direct if the medical staff ceases to function due to a failure to be reimbursed for its services or to unreasonable delay in being reimbursed.

Although plaintiff also asserts that allegations in its Complaint that NABSP is a co-conspirator with Memphis Blue Cross with regard to discriminatory hospital reimbursement policies are sufficient grounds to overrule defendant's Motion this Court does not agree. The record in this cause fully supports defendant's contention that it has and has had no involvement in Memphis Blue Cross's hospital reimbursement policies. Plaintiff's claim that substantial discovery remains to be conducted in this case, particularly of NABSP officials, is not persuasive given the two and a half years this case has been pending. Affidavits submitted by counsel for the defendants also raise questions about plaintiff's intentions in this regard. However, because this Court is of the opinion that summary judgment should be used sparingly in antitrust cases and

only after ample opportunity for discovery [*S.J. Groves & Sons Co.* v. *Ohio Turnpike Commission*, 315 F.2d 235 (C.A. 6th 1963), *cert. denied*, 375 U.S. 824 (1963)], judgment on the issue of defendant NABSP's involvement in Memphis Blue Cross hospital reimbursement policy will not be granted at this time. Defendant NABSP may renew its Motion for Summary Judgment after an appropriate time. Defendant's Motion to certify this question for immediate appeal pursuant to 28 USC §1292(b) is denied.

II. THE McCARRAN-FERGUSON ACT EXEMPTION

The second ground of defendants' Motion asserts that the McCarran-Ferguson Act deprives this Court of jurisdiction. The McCarran-Ferguson Act exempts from antitrust scrutiny all disputes involving a matter which: 1) constitutes the business of insurance; 2) is regulated by state law; and 3) is not an agreement to boycott, coerce, or intimidate or an act of boycott, coercion, or intimidation. 15 USC §§1012(b), 1013(b). Defendants assert that these requirements are met in the present case. However, upon consideration of all the allegations of the Complaint, this Court finds that this action may involve an agreement to boycott, coerce, or intimidate, or acts of boycott, coercion, or intimidation. Accordingly, the McCarran-Ferguson exemption is not applicable to this case and defendants' Motion for Summary Judgment on this issue must be denied.

This Court is persuaded that matters relating to payments by Blue Cross plans, such as the Memphis Plan to hospitals for services rendered to the plan's subscribers, fall within the "business of insurance" within the meaning of §1012(b). *Travelers Insurance Company* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (C.A. 3rd 1973), *cert. denied*, 414 U.S. 1093 (1973); *Nankin Hospital* v.

Michigan Hospital Service, 361 F.Supp. 1199 (E.D. Mich. 1973). Although allegations exist in the Complaint that defendants' alleged conspiracy involves potential encroachment upon the business of rendering hospital services, this Court is of the opinion that these allegations are secondary to and only support plaintiff's main claim that defendants discriminated against plaintiff and other for-profit hospitals in its hospital reimbursement rates. *Compare Battle* v. *Liberty National Life Ins. Co.*, 493 F.2d 39, 39 (C.A. 5th 1974). The main dispute in this action relates to the business of insurance.

Similarly, the business is regulated by state law.

Plaintiff's allegations of a conspiracy to dominate prices and trade in the hospital business are sufficient, however, to invoke the boycott, coercion, or intimidation exception to the McCarran-Ferguson exemption. Plaintiff alleges that in 1971 defendants instituted a policy of differentiating in rates of reimbursement between not-for-profit and for-profit hospitals. Plaintiff asserts that for-profit hospitals like itself were required to "negotiate" with defendants as to the amount of this differential, although the best they could negotiate was to within ninety percent of the average of the not-for-profit hospitals and in fact none of the terms of the agreement could be changed, making the negotiations a sham. In addition, plaintiff contends that for-profit hospitals were forced to sign a special form waiving the right to collect over from patients any excess amount and were required to cost-justify their claims. Defendants were able to achieve these results, plaintiff states, because of the substantial economic power which Blue Cross holds in the Memphis area (Blue Cross controls thirty-five percent of all medical expense reimbursement in the Memphis area). In conjunction with this program, plaintiff charges that defendant engaged in

specific acts of intimidation and coercion. Plaintiff asserts that during the negotiations letters were sent by Blue Cross to plaintiff threatening to terminate plaintiff's relationship with Blue Cross if a permanent contract was not signed. Subsequently, plaintiff asserts Blue Cross did cancel its interim agreement with plaintiff. Plaintiff also asserts that pressure was exerted upon and by its medical staff for plaintiff to sign the agreement. Finally, plaintiff charges that defendants attempted to dissuade patients and other members of the public from using plaintiff's facilities. In this regard, a Preliminary Injunction prohibiting Memphis Blue Cross from persuading or attempting to persuade or divert any group or individual from using plaintiff's hospital was entered by this Court on February 26, 1976.

Where a Complaint specifically alleges that the defendants have engaged in acts of boycott, intimidation, and coercion, and sets out facts in support thereof, summary adjudication should normally not be attempted. *See Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39, 51 (C.A. 5th 1974). This Court holds that plaintiff states a colorable claim of boycott, intimidation, or coercion which it is entitled to develop at trial.

The defendants assert that the boycott, intimidation, and coercion exception to the antitrust exemption has been applied only to discriminatory acts or conspiracies by insurance companies and insurance agents against other insurance companies or agents. A number of courts have so limited the boycott and intimidation exception. However, recently the Court of Appeals for the First Circuit has expressly rejected this limitation on the scope of the exception. *Barry* v. *St. Paul Fire and Marine Ins. Co.*, 1977-1 Trade Cases, 71,593 (1st Cir. 1977). Other Circuits also have applied the exception to the type of conduct

involved in this case, thus rejecting the limitation which defendants would place on its application. *Ballard* v. *Blue Shield of West Virginia, Inc.*, 543 F.2d 1075 (C.A. 4th 1976), *cert. denied*, 45 USLW 3598 (March 8, 1977); *Battle* v. *Liberty National Life Ins. Co.*, 493 F.2d 39 (C.A. 5th 1974). [*See also* the Third Circuit's opinion in *Travelers' Ins. Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (C.A. 3rd 1973), *cert. denied*, 414 U.S. 1093 (1973), a non-blacklisting case in which the Court indicated that upon a proper showing of coercion the McCarran-Ferguson exemption would not have applied.]

In so holding, these Courts have followed the general rule that the antitrust laws should be applied broadly, and exemptions to the antitrust laws narrowly. *See generally Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787 (1974); *Monarch Life Insurance* v. *Royal Protective Life Ins. Co.*, 326 F.2d 841 (C.A. 2nd 1963).

This Court believes that these decisions reflect the better rule and that the boycott, intimidation and coercion exception to the McCarran Act should not be limited to instances of blacklisting within the insurance industry. Accordingly, the McCarran-Ferguson Act does not deprive this Court of jurisdiction over this cause and this ground of defendants' Motion must be rejected.

For all of the foregoing reasons, IT IS THEREFORE ORDERED that defendants' Motion for Summary Judgment is hereby denied. However, defendant NABSP may renew its Motion of Summary Judgment on the issue of its lack of involvement in hospital reimbursement policy at an appropriate time following completion of discovery.

ENTER: This 9th day of August 1977.

/s/ Robert M. McRae, Jr.
Robert M. McRae, Jr., Judge
U.S. District Court